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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-986

ARKANSAS LOUISIANA GAS COMPANY, *Petitioner,*

v.

FRANK J. HALL, MRS. W. E. HALL, SR., THE H. M. HARRELL TESTAMENTARY TRUST, JAMES E. HARRELL, JOHN K. HARRELL, SR., ASA BENTON ALLEN, SIDNEY G. MYERS, JR., W. O. COCHRAN, THOMAS F. PHILYAW, MRS. ELAINE ALLEN, JAMES A. NOE, D. B. MCCONNELL, MRS. EVA L. WEISS, SOL KAPLAN and NATIONAL AMERICAN BANK, New Orleans, Co-Testamentary Executors of the SUCCESSION OF SEYMOUR WEISS, *Respondents.*

PETITIONER'S REPLY TO RESPONDENTS' BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI

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PETITIONER'S REPLY TO RESPONDENTS' BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI

A. RESPONDENTS' BRIEF DOES NOT ADDRESS ITSELF TO THE FACTS OF THIS CASE AS DETERMINED BY THE LOUISIANA COURT OF APPEAL.

Respondents' brief is addressed to a case materially different from this case. Respondents ignore the facts found by the Court of Appeal, upon which its judgment is based, and largely ignore that court's conclusions as to the legal consequences of the facts which it found.

First, Respondents insist (Resp. brief, pp. 2, 3) that the suit "... involved a classic action for damages and reparations for the breach of a private gas sales contract and 'arises under' well established rules and principles of state contract law," and that "[c]ontrary to Arkla's totally erroneous and misplaced contentions that actions for damages for the breach and violation of private gas sales contracts 'arise under' federal law ..." (Resp. brief, p. 15).

The facts are that Respondents' "damages" which they are claiming are solely and simply the additional gas price they claim under their interpretation of the contract which has been on file since 1954 as Respondents' FPC Gas Rate Schedule for gas sold in interstate commerce for resale. While both the trial court (App. pp. 35a, 36a)[1] and the Court of Appeal (App. p. 13a) held that Respondents' rights under the contract were dependent upon the Natural Gas Act, the courts undertook, over petitioner's objections, to interpret the FPC Rate Schedule and to apply parochial ideas of law and policy to its interpretation.

Second, Respondents in their brief (pp. 7, 8) consistently describe the payment of lease royalty by Petitioner to the United States, its lessor, as the payment of "agreed upon prices per MCF for the Government's royalty gas"—and they even go so far as to characterize this statement as "determined by the courts below." This word-juggling disregards and contradicts the specific determination by the Court of Appeal (App. 9a) that the payment to the United States was the payment of *rent,* not the price of a sale. Petitioner's

[1] We cite the appendix to the petition for certiorari as "App. p. —" and Respondents' appendix as "Resp. App. p. —."

position is that the Court of Appeal in interpreting Respondents' Rate Schedule failed to apply properly the federal rule of law embodied in *Mobil Oil Corp.* v. *F.P.C.,* 463 F.2d 256 (D.C. Cir. 1971), cert. den. 406 U.S. 976 (1972), which is determinative of the issue of triggering.[2]

Third, Respondents repeatedly in their brief (for example, pp. 2, 3) charge Petitioner with fraudulent concealment for fourteen years of its continuous breach of the contract. This is in spite of the fact that the trial court rejected[3] their contention of concealment by ignoring it; and the further fact that the Court of Appeal held (App. p. 14a):

> "The trial court did not make a finding of fraudulent concealment, and we find the evidence is insufficient to support such an allegation."

Respondents in their brief and appendix have quoted, out of context, parts or the whole of letters and documents for the apparent purpose of creating an

[2] Cf. *Textile Workers Union of America* v. *Lincoln Mills,* 353 U.S. 448 (1957). See also, *Local 174* v. *Lucas Flour Co.,* 369 U.S. 95 (1962) where this Court held that federal law governs as to the interpretation of collective bargaining agreements under the Labor Managment Relations Act, 61 Stat. 156, 29 U.S.C. § 185. The Court in so holding expressed a need for uniformity equally applicable to Natural gas rate schedules, 369 U.S. at 103:

> "[T]he subject matter ... is peculiarly one that calls for uniform law .... *The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.*" [Emphasis added.]

[3] A contention not passed on is rejected; *Villars* v. *Faivre,* 36 La. Ann. 398 (1884); *Soniat* v. *Whitmer,* 141 La. 235, 74 So. 916 (1917).

impression of wrongdoing or deviousness on the part of Petitioner, which had been advised by its lawyer that "purchase from another party seller" did not include royalty payments. We submit that it is not the practice of this Court on petitions for certiorari to review the evidence; and specific fact findings of the court below should not be disregarded on the basis of references in brief to selected bits and pieces of the evidence.[4]

The same objection is made to the selective quotations in Respondents' brief of excerpts from orders of the Federal Power Commission in the proceeding for declaratory relief begun by Petitioner (Resp. brief, pp. 22-26). The parts of the orders not quoted, in several instances, contain findings and orders that would preclude much of the relief sought in this suit by Respondents. But in that proceeding (now pending in the Federal Energy Regulatory Commission), the issues of status and jurisdiction are all at large, undecided. Petitioner sought review of the orders of the Commission in the United States Court of Appeals for the District of Columbia Circuit (Case No. 77-1146, *Arkansas Louisiana Gas Co.* v. *Federal Power Commission*). During the pendency of the review proceedings, the newly appointed Federal Energy Regulatory Commission sought, and the Court of Appeals granted, remand of the case to the Commission for further consideration; and there the proceeding stands, undecided.

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[4] Respondents' suggestion that Petitioner's reconventional demand, ignored by the courts, in some way consented to the courts' jurisdiction (Resp. brief, p. 10) is in conflict with the Louisiana rules, Code of Civil Procedure, Article 3, that "[t]he jurisdiction of a court over the subject matter of an action . . . cannot be conferred by consent of the parties."

B. THE AUTHORITIES RELIED ON BY RESPONDENTS ARE NOT APPLICABLE TO AN FPC RATE SCHEDULE WHICH IS GOVERNED BY FEDERAL REGULATORY LAW AND IS SUBJECT TO THE COMMISSION'S PRIMARY AND EXCLUSIVE RATE JURISDICTION.

As we have explained, the Respondents have constructed in their brief a case different from the case found and decided by the Court of Appeal. Respondents defend the judgment they have obtained as being for breach of implied obligations in their contract of fair and honest dealing. The fact is that the judgment was based by the Court of Appeal upon an interpretation of Respondents' Rate Schedule which the court was without power to make and not upon any claim of concealment.

In these circumstances, the authorities cited by Respondents as to the competence of the courts to pass on the issues of this suit are beside the point of the case as found by the Court of Appeal. Those authorities deal with features of gas contracts which are not controlled by the *Natural Gas Act,* and do not involve the fixing of, or changes in, the prices of gas sold in interstate commerce for resale, which are governed by specific provisions of Section 4 of the *Natural Gas Act,* and regulations thereunder of the Commission. This case, as passed on by the Louisiana Court of Appeal, required it to interpret Respondents' FPC Rate Schedule, and to determine changes in price, not only for the future, but for the past. Not one of the cases cited in Respondents' brief involved such a problem, as appears from the following review.

(1) *Skelly Oil Co.* v. *Phillips Petroleum Co.,* 339 U.S. 667 (1950), involved a sales contract between a gas producer and a reseller for the sale of gas. The

suit was decided four years before this Court's decision in the *Phillips* case,[5] in which it was first held that the sales of producers, in interstate commerce, were subject to the provisions of the *Natural Gas Act*. At the time the case was decided the contract was indeed subject solely to state contract law.[6] *Merle M. Rowan,* 39 FPC 64 (1968), cited by Respondents as to the Commission's policy, was also decided on the basis of a contract escalation which occurred before the *Phillips* case.

(2) *Pan American Petroleum Corp.* v. *Superior Court of Delaware,* 366 U.S. 656 (1961), was brought by a pipeline company to recover overpayments under a gas sales contract of rates in excess of the producer's filed rate.[7] The case did not concern the interpretation of a FPC rate schedule. Plaintiff's allegations were that the payments were made under duress and in

[5] *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954).

[6] For this reason, *Skelly* did not involve any question as to the Commission's rate jurisdiction or the interpretation of a jurisdictional rate schedule. Since the contracts were viewed as being non-jurisdictional they were not thought to be within the Commission's control and were not filed with the Commission.

[7] There is a major difference between a suit to recover overcharges or collections in excess of the rate on file with the Commission and Respondents' state court action in seeking an increase in rate levels. The difference is explained in *Socony-Mobil Oil Co.* v. *Brooklyn Union Gas Co.*, 299 F.2d 692 (5th Cir. 1962), *cert. den.* 371 U.S. 887 (1962). In that case, the facts were similar to those in *Pan American* in that *Mobil* had collected rates which were in excess of the rate on file with the Commission. The Fifth Circuit found that it had jurisdiction to award the refund of moneys collected in excess of the rate on file with the Commission but that it did not have jurisdiction to authorize a rate increase, that authority being vested exclusively in the Commission. See 299 F.2d at 694-695.

error; and this Court held that the claims obviously did not arise under the *Natural Gas Act* but were claims of right arising under state law, not federal law even though it could be anticipated that defendant would attempt to defend under the *Natural Gas Act.*[8]

(3) *United Gas Pipe Line Co.* v. *Mobile Gas Corp.,* 350 U.S. 332 (1956), affirmed what is now the commonplace that the *Natural Gas Act* provides for *initial rates* and *contract provisions* to be set by contract, but illustrates also that after having been initially set by the parties by their contract no changes can be made except in accordance with Section 4 of the *Natural Gas Act. Phillips Petroleum Co.* v. *F.P.C.,* 349 F.2d 535 (10th Cir. 1965), involved the same principles as to the initial setting of contract rates and the manner in which they could be changed.

(4) Respondents cite *F.P.C.* v. *Hope Natural Gas Co.,* 320 U.S. 591 (1944), for the well settled rule that the Federal Power Commission "has no power to make reparation orders." Respondents apparently draw from this the unwarranted but erroneous conclusion that courts do have such powers; see, to the contrary, *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U.S. 246 (1951). In *F.P.C.* v. *Sunray DX Oil Co.,* 391 U.S. 9 (1968), this Court repeated its statement that the Commission has no reparation powers; this was decided in an opinion in which the Court said that the "in-line price" once set could not be changed by the Commission except in accordance

[8] See, *Lewis* v. *Transcontinental Gas Pipe Line Corp.*, 200 F. Supp. 219, 220 (S.D. Tex. 1961) holding that the "well-pleaded complaint rule" referred to in *Pan American* does not apply to the determination of agency versus court jurisdiction.

with the provisions of Sections 4 and 5 of the *Natural Gas Act*.

(5) In *Louisiana* v. *FPC.*, 503 F.2d 844 (5th Cir. 1974), the court affirmed the authority of the Commission to issue curtailment orders which would affect consumer contracts not otherwise subject to regulation by the Commission. The consumer would be entitled to bring a suit for breach of contract, even though the gas companies might have a federal defense.

(6) *Skelly Oil Co.* v. *F.P.C.*, 532 F.2d 177 (10th Cir. 1976), involved the contract basis for Skelly's rate change filing. The Commission held that the contract did not support the higher rate and the court held, construing the contract on review of the Commission's order, that it did. The case is authority that a rate change filing is required for a contract change.

(7) *City of New Orleans* v. *United Gas Pipe Line Co.*, 390 F.Supp. 861 (D.C. E.D. La. 1974), is a decision by Judge Rubin (now of the Fifth Circuit Court of Appeals) under the "well-pleaded complaint" rule that in order to be within the removal jurisdiction of the federal court, the plaintiff's pleading itself must show a federal question. Anticipation of a federal defense is not enough to support federal jurisdiction. In that case the contract involved was a consumer contract not subject to the Commission's rate jurisdiction. Judge Rubin's decision on the removal of the instant case, referred to in Respondents' brief, is another example of the application of the "well-pleaded complaint" rule.

(8) *Gulf Oil Corp.* v. *American Louisiana Pipeline Co.*, 282 F.2d 401 (6th Cir. 1960), and *Western Natural Gas Co.* v. *Cities Service Gas Co.*, 507 Pac.2d

1236 (Okla. 1972), appeal dismissed and cert. den. 409 U.S. 1052 (1972), both involved actions for damages arising from breaches of one party's obligations to deal honestly and fairly with the other and did not involve matters controlled by the *Natural Gas Act*. The cases did not involve a violation of a certificate issued by the Commission, the interpretation of a rate schedule or the determination of the price of gas sold in interstate commerce for resale. In the *Gulf* case, Gulf was obligated by contract to file and diligently to prosecute an application with the Commission for a Certificate of Public Convenience and Necessity; Gulf had signed the sales contract with plaintiff without insisting upon, although it asked for, a provision that the initial sales price of the gas should be found by the Commission to be "just, fair and reasonable." In its application for a certificate Gulf inordinately delayed the Commission's decision by insisting on the very provision that it had waived its contract right to require. This conduct on Gulf's part much delayed and finally frustrated the contract and the holding of the court was that Gulf had breached the contract by its failure to deal fairly and honestly with the buyer.

The *Cities Service* case was essentially the same as the decision in *Gulf*. Cities Service had a contract with Western for purchase of gas which expired at the end of the ten-year term, although under the provisions of the *Natural Gas Act* the delivery of gas could not be terminated without an order of the Commission granting the seller the right to abandon delivery. Cities Service Gas Co. intervened in Western's abandonment proceeding, as the court held that it had the right to do, but Western claimed, and the jury in the state court found, that Cities Service acted in bad faith and

had misrepresented the facts to the Commission with the result that Western's abandonment proceeding was unsuccessful. Western was granted judgment for damages for the additional money it could have received for a sale of its gas to someone other than Cities. The case stands solely for the proposition that a breach of duty by the buyer as to a matter not controlled by the *Natural Gas Act* (as rates are) may be remedied by a damage action.[9]

(9) *Eastern Petroleum Co.* v. *Kerr-McGee Corp.*, 447 F.2d 569 (7th Cir. 1971), and *Louisiana Nevada Transit Co.* v. *Woods,* 393 F.Supp. 177 (W.D. Ark. 1975), cited by Respondents, both involved "favored nation" provisions in intrastate gas sales, and neither has any relevance to the principles on which Petitioner's application for certiorari is based.

[9] It was for this reason that in *Cities Service Gas Co.* v. *F.P.C.*, 535 F.2d 1278, 1288-89 (D.C. Cir. 1976) the D.C. Circuit determined that the damages awarded could not be used as a set-off against the obligation to pay the Commission prescribed rate.

C. CONCLUSION

In the *Natural Gas Act* Congress conferred upon the *Commission* exclusive jurisdiction to determine the prices at which natural gas is sold for resale in interstate commerce. If the courts of each of the states were to have the power to interpret, in the light of local ideas of policy, the rate schedules which control the prices for such sales, the uniformity necessary to the *Commission's* administration of the *Natural Gas Act* would be undermined.

Respectfully submitted,

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